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Honorable Riko Bishop
Chair, Nebraska Supreme Court Committee on Practice & Procedure
Administrative Office of the Courts
1445 K St.
Lincoln, NE 68509

Re: Nebraska Jury Instructions

Dear Judge Bishop:

We write as counsel for Public.Resource.Org (“Public Resource”), a 501(c)(3) non-profit corporation based in California. The mission of Public Resource is to enhance public access to government information and public law. As you may be aware, Public Resource has made significant strides in pursuit of this mission, including a recent victory at the United States Supreme Court regarding public access to annotated state codes. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020). That case makes clear that edicts of government cannot be copyrighted by states and that there is a strong public interest in broad access to such edicts.

We write specifically to urge the State of Nebraska to remove barriers to access that the State has impermissibly put in place with respect to the Nebraska Jury Instructions — Civil and Criminal (the “NJI”), developed and promulgated by the Nebraska Supreme Court Committee on Practice & Procedure (the “Committee”). At present, Nebraska attorneys and the rest of the public must pay a \$960 fee to a commercial publisher to gain access to the NJI. Even for those that can afford the NJI, these materials are not easily accessible to the visually impaired and are difficult to navigate.

Overview and Background

Our client has made the NJI, and model jury instructions from a number of other states, publicly available and digitally accessible on the non-profit Internet Archive (<https://archive.org>) at the following location:

<https://archive.org/details/JuryInstructions>

The collection offered by Public Resource has several features that make the edicts of government contained therein more useful. Books containing model jury instructions are scanned and then undergo several operations, such as Optical Character Recognition or “OCR,” to convert typed text into machine-coded text. Public Resource uses custom open-source software code to create modern HTML files, making the materials more usable for the visually impaired. In the “subject and topics” pane accessible in the collection, a user may click on a particular state name to find materials for that jurisdiction. There is also the capability to search inside the texts across the entire collection, allowing a user to enter a search term such as “eviction”:

<https://archive.org/details/JuryInstructions?query=eviction&sin=TXT>

The search identifies any volumes containing that search term. When the user clicks on a volume, it will open to the relevant page that contains the term; “pins” below the book identify other pages that have that word or phrase.

Public Resource is working with legal informatics clinics to make the collection even more usable, using big data and machine learning technologies to identify similar jury instructions in different states. By allowing such research efforts, our client expects to see even more improvements in accessibility and usability of the instructions. All of these materials are easily found on the world wide web using search engines such as Google or Bing.

The Nebraska Jury Instructions

The NJI is an invaluable tool of democracy in the State of Nebraska. In making the NJI accessible to the broader public, Public Resource hopes to facilitate widespread participation in the Nebraska legal system. The jury is a key component of a fair and accessible judicial system in the United States. The widescale availability of the NJI, therefore, contributes to fair and accessible justice in the State of Nebraska.

The NJI constitutes the best plain-language statement of the law as concerns charging of juries in civil and criminal cases in the State. As the Nebraska Supreme Court has recognized, the “general rule is that whenever applicable, the Nebraska Jury Instructions are to be used.” *Warner v. Simmons*, 849 N.W.2d 475, 479 (Neb. 2014); see *State v. Putz*, 662 N.W.2d 606, 616 (Neb. 2003).

Nebraska courts have established that “as long as there is a Nebraska pattern jury instruction that accurately states the law and applies to the case, it is the instruction which should be given.” *State v. Warren*, 609 N.W.2d 617, 622 (Neb. Ct. App. 2000). This widespread use and encouragement is well-justified, given the quality of the NJI. Thus, its integration into the Nebraska judicial system is natural.

Edicts of Government Doctrine

As you are no doubt aware, because the NJI was issued in the name of the Nebraska Supreme Court Committee on Practice and Procedure and created by judges in the course of their judicial duties, it is not eligible for copyright. The American legal system operates on the assumption that every citizen knows the law. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507 (2020). Thus, it follows that all citizens should have free access to the contents of the law. *Id.* The U.S. Supreme Court has given effect to this principle through the articulation of the government edicts doctrine. *Id.*

The Copyright Act grants monopoly protection for “original works of authorship.” 17 U.S.C. § 102(a). Effectively, this means that, to be copyrightable, a work must have a copyright-eligible author. Under the government edicts doctrine, officials empowered to speak with the force of law are not copyright-eligible authors of the works they create in the course of their official duties. *Georgia*, 140 S. Ct. at 1501. Thus, such government work product is excluded from copyright protection. *Id.* at 1504.

The government edicts doctrine, as it exists today, emerged from a trio of Supreme Court cases decided in the 19th century. *See Wheaton v. Peters*, 33 U.S. 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Myers*, 128 U.S. 617 (1888).

These three cases established a straightforward rule: because judges are empowered to speak with the force of law, they cannot be the authors of the works they create in the course of their official duties for the purposes of obtaining copyright. *Georgia*, 140 S. Ct. at 1507. In our client’s recent case against the State of Georgia, the United States Supreme Court extended the application of the government edicts doctrine to include works created by legislators acting in their role as legislators. *Id.* at 1505.

In the 2020 *Georgia* decision, the Court clarified that the relevance of the government edicts doctrine to a particular work rests on the identity of the author rather than whether the work carries the force of law. *Id.* at 1506. Thus, it is not required to determine which materials constitute “the law,” because the doctrine bars officials responsible for creating the law from being considered authors for copyright purposes of *any work* created in their lawmaking capacity. *Id.* In effect, this means that the doctrine applies not only to final legislation but also to explanatory and procedural materials that legislators create in their official duties (including but not limited to model jury instructions). *See id.* at 1508.

Under Supreme Court precedent, then, copyright protection cannot exist in works that, like the NJI, are (1) created by judges and legislators (2) in the course of their judicial and legislative duties. *Id.*

The Committee

The NJI is created by judges in the course of their judicial duties. More specifically, it is authored by the Nebraska Supreme Court Committee on Practice & Procedure, which sits within the Supreme Court and the State of Nebraska Judicial Branch. Therefore, the NJI falls under the above framework and is ineligible for copyright protection.

The NJI itself lays out how integral the judicial branch's involvement has been to its creation. The State's first jury instruction pamphlet was developed by the Nebraska District Court Judges' Association in 1942. *See* 1 NEBRASKA JURY INSTRUCTIONS — CIVIL & CRIMINAL SECOND EDITION xii (2020-2021 ed. 2020). Later, in 1969, the Nebraska Supreme Court Committee on Practice & Procedure promulgated the first edition of the modern-day NJI. *See id.* At each stage, prominent Nebraska judges, like the Honorable Lyle E. Strom and the Honorable Warren K. Urbom, have been involved in writing the jury instructions. In fact, the NJI's pages emphasize that "the mark of these two men is on every pattern instruction published in the State of Nebraska." *Id.*

The Nebraska Constitution empowers the Nebraska Supreme Court, and thus the Committee, to "promulgate rules of practice and procedure for all courts" for the "effectual administration of justice and the prompt disposition of judicial proceedings." NEB. CONST. art. V, § 25. The authors' dedication to this purpose is indistinct from their judicial duties. Additionally, the creators' experience as judges was a necessary part of their authorship. This experience gives the NJI the weight it holds today.

For these reasons, the Committee is a part of the judiciary, and the NJI was created as part of its authors' judicial duties. It is therefore ineligible for copyright protection.

Conclusion

The commitment shown by those involved in creating the NJI is a testament to their devotion to the law and public service. The intentions of those involved in the work would be best served through offering public access to these instructions, so that all may benefit from the knowledge that they have thoughtfully shared.

Particularly at a time when our nation's legal system has come under substantial scrutiny from all sides, a commitment to transparency and openness in the law is crucial to restoring public confidence. Those in the legal system should strive to eliminate barriers to information that should be widely available.

Removing the claims of copyright protection on the NJI would be an invaluable step in this direction. Moreover, it aligns with Nebraska's State motto—"Equality Before the Law"—and furthers Nebraska Supreme Court Chief Justice Michael G. Heavican's commitment to "recogniz[ing] deficiencies in equal access to justice" and addressing them. Chief Justice Michael G. Heavican Equity Statement to Nebraska's Court Family and Legal Community,

STATE OF NEB. JUD. BRANCH (June 11, 2020),

<https://supremecourt.nebraska.gov/courts/supreme-court/chief-justice-equity>.

We hope you will agree that the entire public should be able to enjoy the benefits of the NJI. Currently, the NJI provides an inaccurate copyright notice that purports to vest ownership in the Nebraska Supreme Court. For the reasons explained, the NJI is not eligible for copyright protection. Therefore, we ask that you:

1. abandon and withdraw all copyright claims from the NJI; and
2. support efforts to provide public access to these important edicts of government.

Along with Public Resource, we would be more than happy to discuss this with you or your staff. Thank you for your time and attention.

Respectfully submitted,



Christopher T. Bavitz

cc: Carl Malamud
President, Public Resource (By Email)

David Halperin
Of Counsel, Public Resource (By Email)